No. 75-778

In the Supreme Court of the United States

OCTOBER TERM, 1975

ANTHONY SCHERER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JULIUS L. SHERWIN
7 South Dearborn Street
Suite 1610
Chicago, Illinois 60603
Attorney for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court:

Petitioner, Anthony Scherer, prays that a writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit, entered on September 4, 1975.

(a) OPINION BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is unreported at the date of the preparation of this Petition. It is reprinted in the Appendix attached hereto, App. p. 1 *infra.*

(b) JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit, affirming the Judgment of the United States District Court for the Northern District of Illinois, was entered on September 4, 1975. (Appendix B, *infra*) Petition for Rehearing was denied on October 31, 1975. (Appendix C, *infra*)

The jurisdiction of this Court is invoked under Title 28 United States Code, §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Are records required under 26 C.F.R. §178.124 and §178.125 of intrastate sales of personal firearms by a licensed firearms dealer.

2. Must a licensed firearms dealer maintain records on firearm sales conducted off the premises named in his license.

3. Does a search warrant that does not contain a particular description of the articles to be seized satisfy the requirements of the Fourth Amendment.

4. Where a Defendant is the victim of unwarranted harassment and unscrupulous and unlawful activity on the part of alcohol, tobacco, and firearms agents for a period of over ten years immediately preceding his indictment, should the court in the exercise of its supervisory powers over the administration of criminal justice dismiss the indictment.

5. Is the suppression by the prosecution of evidence favorable to petitioner, upon request, violative of due process where the evidence is material to proof of petitioner's innocence and where such suppression is in conflict with this Court's decision in *Brady* v. *Maryland*.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Because of the number and length of the constitutional provisions, statutes and regulations involved, they are set forth in Appendix D attached to this Petition, *infra*.

STATEMENT OF THE CASE

Petitioner was convicted after a bench trial on nine (9) counts of an indictment charging him with failing to maintain the records required of a federally licensed firearms dealer in violation of 18 U.S.C. §922(m). Specifically, Petitioner was convicted of six counts of failure to maintain his Firearms Acquisition and Disposition Record in conformity with 26 C.F.R. §178.125 and three counts of failure to complete Treasury Form 4473 as required by 26 C.F.R. §178.124. Petitioner was sentenced to concurrent two-year terms of incarceration on each count.

Petitioner was a federally licensed firearms dealer operating under the firm name of Precision Shooter Supply, Box 197, Route 1, Hampshire, Illinois. He maintained an office connected to a barn on his property from which he was licensed to conduct his firearms business. He has been a federally licensed firearms dealer since approximately 1962. It was from the office attached to his barn that the Petitioner conducted his firearms business. (R. 1513, 1612). His business inventory, consisting primarily of automatic weapons, was stored there as well. (R. 1513, 1612-13, 1631-32). Petitioner also maintained a personal collection of firearms mainly pistols, shotguns and rifles in his house separate and apart from his business inventory. (R. 1513-14, 1631-32, 1634).

Between February and August, 1972 government informer, George Rivard, made four (4) "controlled buys" from Petitioner. None of these transactions occurred at Petitioner's business premises. All of the firearms sold were part of Petitioner's personal collection of firearms. At no time were any Forms 4473 completed for any of these transactions, nor were the firearms entered in Petitioner's Firearms Acquisition and Disposition Record, kept in connection with his business.

On the basis of the four (4) firearms sold to George Rivard a search warrant was obtained on September 28, 1972. The warrant was executed by a group of special agents of the Bureau of Alcohol, Tobacco and Firearms on October 4, 1972. Among other things seized, some seventy (70) assorted firearms, which comprised Petitioner's personal collection, were removed from his house and confiscated by the government. Also seized were Petitioner's firearms records and other miscellaneous business records, all of which were removed from Petitioner's business office attached to his barn which was a separate building on his farm. These items served as the basis for Petitioner's arrest, indictment and subsequent conviction.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS RAISES FUNDAMENTAL QUESTIONS OF THE PROPER CONSTRUCTION OF THE 1968 GUN CONTROL ACT AND THE REGULATIONS PROMULGATED THEREUNDER WHICH REQUIRE RESOLUTION BY THIS COURT.

This case merits review by this Court because it presents several important questions of statutory construction regarding the 1968 Gun Control Act and regulations promulgated thereunder. The issues posed require resolution and interpretation by this Court, not only for the guidance of trial and appellate judges, but for the guidance as well of all firearms dealers licensed under the provisions of the 1968 Gun Control Act.

A.

The Court of Appeals held that the provisions of 26 C.F.R. §§178.124 and 178.125 apply to every sale of a firearm by a licensed dealer. This construction of §§178.124 and 178.125 is patently erroneous for several reasons. First, it ignores the distinction long recognized by the government between firearms possessed for a deal's business and those which form and are a part of a personal firearms collection. It was conceded below that firearms may be acquired by a licensed dealer for personal use or for a personal collection without use of the Federal firearms license in intrastate transactions and without the necessity of maintaining records of such acquisitions under §§178.124 and 178.125. In addition, industry circular No. 72-30 released by the United States Treasury Department in 1972 specifically recognizes that a licensed dealer may own per-

sonal firearms and authorizes their maintenance on the dealer's business premises under certain prescribed circumstances without the obligation of entering such firearms in his business records. Despite recognition of the licensee's right to acquire and maintain a private collection of firearms without the necessity of keeping any records for such firearms, the Court of Appeals holds that records of the sale or other disposition of a licensee's personal firearms must be maintained. Having recognized that a licensed dealer may acquire and own firearms for personal use without being required to keep the records prescribed by a Federal regulation, it must also then be recognized that the right of sale or other disposition of a private collection of firearms is a natural and necessary incident of ownership. The right of a licensee to acquire and possess firearms for his own personal use and collection without obligation to maintain the records prescribed by regulation must necessarily also include the right to dispose of those firearms. Since the intrastate acquisition and ownership of personal firearms is exempt from the purview of §178.125, the disposition of personal firearms should be equally exempt from the recording provisions of §§178.124 and 178.125.

Secondly, 26 C.F.R. §178.125(e) speaks in terms of firearms possessed for the dealer's business. 26 C.F.R. §17.125 (e) prescribes the records required of a licensed dealer in the following terms:

> "Each licensed dealer . . . shall on and after the effective date of this part enter into a permanent record each receipt and disposition of firearms. . . . In addition, before commencing or continuing firearms business . . . each licensed dealer . . . shall inventory the firearms . . . possessed for such business . . . and shall record same in the record required by this paragraph."

Reference is made not to all firearms owned or possessed by a dealer but to firearms which are "*possessed for such business,*" i.e., *a licensee's firearms business.* An inventory is not required of all firearms owned by a licensed dealer but only of those that are a part of his business. Notwithstanding the fact that an inventory and records of business firearms only need be kept, the Court of Appeals holds that the disposition of any firearm must comply with the recording provisions of 26 C.F.R. §§178.124 and 178.125.

The restriction of the required inventory and record keeping to "*firearms possessed for such business*" is indicative of the type of activity and type of firearm which is sought to be regulated. It is the business of firearms dealers and the firearms which are a part thereof which is sought to be regulated *not their personal collections.* The necessary implication from a fair reading of the regulation is thus that records are required of firearms acquired for such business and of firearms disposed of from such business. The only records required to be maintained are those of firearms which are a part of or are to become a part of the licensee's firearms business. Such a construction of the regulation is consistent with the avowed purpose of the 1968 Gun Control Act which is as follows:

> ". . . it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes, or provide for the imposition by Federal regulations of any procedures or

requirements other than those reasonably necessary to implement and effectuate the provisions of this title."

The distinction between personal and business firearms is necessarily implicit in the regulations themselves, finds support in Treasury Department Circular No. 72-30, and is consistent with the legislative history of the 1968 Gun Control Act. The Court of Appeals' failure to recognize that distinction in construing 26 C.F.R. §§178.124 and 178.125 is a fatal error which requires review and correction by this Court.

B.

Also at issue in the present case is the question of whether sales which occur at locations other than a dealer's licensed business premises are exempt from the record-keeping provisions of 26 C.F.R. §178.124 and §178.125. Although a firearms dealer's license is specifically limited both in terms of time (26 C.F.R. §178.49) and place (26 C.F.R. §178.50), the Court of Appeals held that a licensee's responsibility for maintaining the records prescribed by 26 C.F.R. §178.124 and §178.125 extends beyond the licensed business premises. This interpretation of the regulations involved conflicts with the provisions of 26 C.F.R. §178.41 (b), §178.42, §178.50 and Revenue Ruling 69-59.

26 C.F.R. §178.41(b) expressly provides

> "A separate license must be obtained for each business and each place at which the applicant is to do business. Such license shall, subject to the provisions of the Act and other applicable provisions of law, *entitle the licensee* to . . . *engage in the business specified by the license,* at the location described on the license, and, for the period stated on the license. . . ." [Italics supplied]

Under 26 C.F.R. §178.42 a separate fee is required to be paid for each place at which business as a licensee is to be conducted.

26 C.F.R. 178.50 provides:

> "The license covers the class of business or the activity specified in the license at the address described therein. Accordingly, a separate license must be obtained for each location at which a firearms or ammunition business or activity requiring a license under this part is conducted. . . ."

Finally, the Treasury Department has ruled that a licensee may engage in the business covered by his license only at the specific business premises for which the license has been obtained (R. 69-Ex. C, Revenue Ruling 69-59 published February 10, 1969).

Taken together the foregoing regulations and Revenue Ruling unequivocally support the conclusion that the authority to conduct business obtained pursuant to a license is limited to the location specified thereon. A separate license accordingly is required for any other location at which *business* is to be conducted.

At the time of the transactions alleged in the indictment Petitioner resided and still resides on a farm located in Kane County, Illinois. Petitioner conducted his firearms business from an office attached to his barn, a separate building from his home. (R. 1513). Petitioner's license as well as his license applications listed as his place of business, "*an office attached to the barn*". (Govt. Ex. 1A, 1B, 1C) Petitioner was thus authorized in accordance with 26 C.F.R. §178.41(b) to transact business only at the location specified on the license, i.e., ***his office attached to the barn.***

The evidence disclosed that none of the transactions alleged in the indictment occurred at the Petitioner's place of business. (R. 471-72, 484-86, 494, 509). All of the sales or transfers of firearms alleged in the indictment occurred at a place other than that specified in Petitioner's license. Quite clearly, sales or transfers of firearms made by a licensed dealer from his business premises are required to be recorded, but what of sales or transfers made away from the licensed premises as in this case? Can one constitutionally be require to maintain records of transactions he was not licensed or authorized to conduct?

Since Defendant held no license to sell or otherwise transact business from his home or from a location other than his "office attached to the barn", he was a nonlicensee as to the transactions alleged in the indictment all of which occurred away from Petitioner's business premises. Not being licensed to engage in business at locations other than that specified in his license, the Defendant was, therefore, not required to maintain the records prescribed by 26 C.F.R. §178.124 and §178.125 which need be kept only by a licensee.

The duty to maintain records should be coextensive with the privilege of conducting business and vice versa. Since the regulations limit the location where a federally licensed dealer may legitimately conduct business, they should be construed to limit as well the records a licensee is required to maintain in connection with his business. Consequently, as to those transactions which occurred away from Petitioner's business premises, for which he held no license, no records should be required to be maintained under 26 C.F.R. §178.124 and §178.125. The Court of Appeals' contrary interpretation of the regulations is erroneous. This Court should intervene to correct that misconstruction of the federal regulations involved.

II.

A SEARCH WARRANT DOES NOT SATISFY THE PARTICULARITY REQUIREMENTS OF THE FOURTH AMENDMENT WHERE A MORE PRECISE DESCRIPTION OF THE ARTICLES TO BE SEIZED IS KNOWN AND AVAILABLE TO THE OFFICERS REQUESTING THE WARRANT AND CAN BE ALLEGED.

The search warrant issued herein authorized the seizure, among other things, of all "business records relating to the purchase and sale of firearms." Recognizing the particularity requirement of the Fourth Amendment to be a rule of reason, the Court of Appeals found the warrant as issued not overly broad in the constitutional sense.

The command of the Fourth Amendment is that no warrants shall issue but upon probable cause and particularly describing the place to be searched and the persons or *things to be seized.* By requiring a particular description of the things to be seized, the general exploratory searches found abhorrent by the colonists were sought to be eliminated. *Coolidge* v. *New Hampshire,* 403 U.S. 443, 467, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1970). The constitutional requirement of warrants particularly describing the things to be seized is violated where, as here, the searching officers are permitted to describe in general terms the items sought despite their advance knowledge of and intent to seize specific documents.

The officers requesting and executing the instant search warrant were experienced agents of the Bureau of Alcohol, Tobacco and Firearms (A.T.F.), knew the petitioner, Anthony Scherer, and were thoroughly familiar as well with the records he was required to maintain as a licensed

gun dealer. In addition to their knowledge of what records were required to be maintained, agents of A.T.F. had conducted an examination and inspection of petitioner's records approximately a year prior to the application for the search warrant, at which time photocopies of all of petitioner's records were made. A.T.F. and its agents thus knew in advance of the search precisely what records were in petitioner's possession and where they were kept.

In spite of the fact that the records to be seized were known to A.T.F. with a high degree of specificity, *the warrant as it was requested and issued was in effect a general warrant.* Instead of describing the records sought as (1) the Firearms Acquisition and Disposition Record required by 26 C.F.R. §178.125 and (2) Treasury Forms 4473 required by 26 C.R.F. §178.124, the instant warrant authorized the seizure of all "business records relating to the purchase and sale of firearms."

Before a description such as that contained in the instant search warrant is deemed sufficient to satisfy the constitutional requirement of particularity, it should be clearly made to appear that a more precise description could not have been obtained. Here the agents requesting the warrant knew precisely what business records were sought and could and should have been required to name the specific documents the government needed and wanted. *VonderAhe* v. *Howland,* 508 F.2d 364 (9th Cir. 1975). The description of the articles to be seized in a warrant should be as specific as circumstances permit. This was not done here. To sanction anything less is unreasonable and undermines the protection afforded by the Fourth Amendment.

III.

IN THE EXERCISE OF ITS SUPERVISORY POWERS OVER THE ADMINISTRATION OF CRIMINAL JUSTICE, THIS COURT SHOULD DEFINITIVELY ESTABLISH THE RIGHT OF A DEFENDANT TO DISMISSAL OF THE CHARGES BROUGHT AGAINST HIM WHEN THEY REPRESENT THE CULMINATION OF STATED EFFORTS OF GOVERNMENT AGENTS TO "GET" AND "BUILD A CASE" AGAINST THE DEFENDANT.

Prior to trial, petitioner moved for a dismissal of the indictment. The motion was premised upon a chronology of events which established a persistent pattern and course of conduct on the part of A.T.F. agents and approximately fourteen informers acting under their supervision and direction to ensnare, entrap and otherwise deprive petitioner of his constitutional rights and liberties. The evidence in support of petitioner's motion included the following: Thomas Brennan, an agent of A.T.F., testified that for a ten-year period from approximately 1961 to 1971, he participated directly or indirectly in the investigation of Anthony Scherer. (R. 1342). His reason for conducting such an investigation was succinctly stated:

> "As I told Mr. Scherer . . . when he came into business, it was my personal opinion that it was impossible to make money dealing in firearms and that I intended to monitor his activities to the best of my ability. I did that for approximately ten years, sir, whenever time was available." (R. 1343-44).

Monitoring Scherer's activities included innumerable meetings with government informers who were solicited and requested to attempt to make purchases of firearms from Scherer. The record discloses that on April 20, 1965 Brennan met with one Richard Cain, a now deceased ex-

convict, who agreed to attempt a purchase of machine guns from the petitioner. (R. 1530). Again on June 15, 1965 Brennan met with one Tom Mosley, alias Vince Barry, who made contact with the petitioner and purchased a Mossberg rifle. (R. 1529-30). *Again,* on September 9, 1965 Brennan met with one Robert Fleischauer who agreed to attempt a purchase from Scherer. *Again,* on October 26, 1964 Brennan met with one John Pichetti, who agreed to attempt a purchase of a machine gun from Scherer. (R. 1533). *Again,* on July 7, 1965 Brennan met with one Eric Carrill to make arrangements for an attempted buy from Scherer. The efforts to purchase firearms from Scherer were continued by Brennan through use of numerous other unnamed informants as well. In addition, *agent Brennan maintained almost daily surveillance of Scherer's home.* This pattern of conduct persisted for over ten years despite the fact that there was no evidence of any illegal dealings by Scherer, nor were any charges ever brought against Scherer.

One Charles Yanover, a friend of Scherer's, was arrested in February, 1967 for selling illegal firearms to an undercover agent of A.T.F. He was never indicted or prosecuted. He testified that throughout an interrogation following his arrest, agents of A.T.F. repeatedly solicited him to *"help build a case against Scherer."* Agent Nick Noack told him, for example: *"We don't want you; we want Scherer. If you help us get Scherer, we will let you off the hook."* (R. 1394). Agent Brennan intimated that if Yanover cooperated in "building" a case against Scherer, he would be given a "pass." (R. 1398). A similar offer was extended to Yanover by United States Attorney Morrisey (R. 1402).

The unlawful harassment of Scherer continued in 1968. In that year shipments of deactivated (welded) and unserviceable Thompson submachine guns to Scherer's customers were intercepted by agents of A.T.F. Without warrants and without any reasonable grounds for believing any crime had been committed, the packages were opened and the firearms confiscated. One shipment to a Dr. Carabelli was intercepted by A.T.F. *Agent Anderson, who pounded out the weld and confiscated the firearm.* (R. 1499). Only after a complaint was lodged with the Director of A.T.F. was the Thompson rewelded and returned to Dr. Carabelli. A second shipment to a John C. Andrews *was intercepted by A.T.F. Agent Brennan. A required Treasury Form 5, which had been enclosed in the package, was removed in transit, thereby creating a fraudulent basis for the arrest of Scherer.* His arrest was prevented only because a duplicate copy of the required Form 5 was maintained in his business office.

The incidents described above are illustrative of the type of grossly improper and unlawful governmental conduct to which Scherer was subjected. It is clear from the foregoing that Scherer was the object of more than just a routine investigation. Concerted efforts on the part of A.T.F. agents to "get" and "build a case" against petitioner are neither routine or proper, nor do they fall within the scope of proper law enforcement activities.

Where, as here, there is conclusive and uncontroverted evidence that during more than ten years the defendant was the target of oppressive harassment and unscrupulous and unlawful activity on the part of A.T.F. agents, due process and a defendant's right to non-discriminatory prosecution should require a dismissal of the charges against him. Moreover, this Court has supervisory powers

over the administration of justice, which powers extend not only to government prosecutors but to their investigative agencies as well. *McNabb* v. *United States,* 318 U.S. 332, 340, 63 S.Ct. 608, 613, 87 L.Ed. 819 (1942). This Court should utilize its supervisory powers whenever the administration of justice is tainted. *Communist Party of the United States* v. *Subversive Activities Control Board,* 351 U.S. 115, 124, 76 S.Ct. 663, 668, 100 L.Ed. 1003 (1965).

The evidence clearly demonstrates that Scherer was not prosecuted in good faith nor in the spirit of justice. To the contrary, he was the victim of nothing less than a witch hunt to rid our society of an individual who has not hesitated to assert his rights to fair play and substantial injustice. (See *Scherer* v. *Morrow,* 401 F.2d 204 (7th Cir. 1968); *Scherer* v. *Brennan,* 379 F.2d 609 (7th Cir. 1967)). No court should become an accessory to such an unlawful undertaking. Dismissal of the indictment under this Court's supervisory power is the appropriate cure for the reprehensible and unlawful conduct of A.T.F. agents to which the petitioner was subjected.

IV.

THE SUPPRESSION BY THE PROSECUTION OF EVIDENCE FAVORABLE TO PETITIONER, UPON REQUEST, VIOLATES DUE PROCESS WHERE THE EVIDENCE IS MATERIAL TO PROOF OF PETITIONER'S INNOCENCE AND WHERE SUCH SUPPRESSION IS IN CONFLICT WITH THIS COURT'S DECISION IN BRADY v. MARYLAND.

The Court of Appeals erred in adopting the limited and erroneous view taken by the trial Court that certain events that were testified to by certain witnesses covering a ten year period of protracted surveillance and pursuit of the petitioner by agents of A.T.F. seeking to entrap, ensnare

and "*to build a case*" against the petitioner, were "too remote in time and not relevant to the instant case."

The trial Court continuously required a showing that events which occurred prior to the indictment be somehow related to or connected with it (Tr. 1340-1). We submit that the Court erred in taking such a limited view and in circumscribing the admissible evidence to that which occurred at the time of the events charged in the indictment.

It must be remembered that the defendant charged he was the victim of a willful and malicious conspiracy on the part of ATF and its agents to harass, ensnare, entrap and essentially drive him out of business as a licensed firearms dealer. In an effort to prove the entire scheme and to show the connection with the indictment which the Court had so earnestly insisted upon, the defendant moved for an Order upon the U.S. Attorney to produce certain named Agents of ATF and special employees or informers used by that agency, all of whom had been involved in the investigation of the defendant, and some of whom were under the control of the Government (R. 55).

The Court ruled that since the agents and employees named were not protected from service of a subpoena, there was no basis or good cause for requiring the Court to so order the Government (Tr. 1114). Additionally, the Court ruled that the motion should have been filed prior to trial and, consequently, denied the motion subject to its being reconsidered at a later time (Tr. 1115, 1117). Defendant, however, specifically requested, prior to trial, a hearing on the allegations of his motion to dismiss because of discriminatory enforcement (R. 15-3), which request was denied by the Court (R. 16). Had such a hearing been held prior to trial, as it should have been, the necessity for requesting the production of Government witnesses at trial could have been avoided.

However, a more important reason for holding a pre-trial hearing on the motion to dismiss existed. In line with the decision in *Simmons* v. *United States,* 390 U.S. 377, 88 S.Ct. 966, 19 L.Ed. 2d 1247 (1968), a pretrial hearing would have afforded the defendant an opportunity to testify to all of the unlawful acts of ATF agents and others he asserted without waiving at trial his privilege against self-incrimination. Quite possibly, by testifying at a pre-trial hearing, the defendant could have "bridged the gap" and established the prima facie case of invidious discrimination that the Court found to be absent. Not having been afforded that opportunity, and not wanting to waive his right to remain silent at trial, defendant was required to resort to calling Government agents and employees and documents, attempting thereby to establish the allegations of his motion.

Even then, defendant was thwarted in his effort by the Court. A subpoena duces tecum was issued and served upon ATF commanding the production of the reports filed by Agents Brennan, Anderson, Noack and others, any Treasury Department memoranda prescribing the records or reports required of agents on a daily, weekly or case basis, and manuals and instructional materials given to ATF agents in the course of their training (Tr. 1219, 1226). *The Government moved to quash the subpoena* (Tr. 1213). Defendant argued that the material sought was necessary to and in support of his position that there was an on-going conspiracy on the part of ATF to terminate his license. The Court responded:

> "The Court: . . . Assume that there was a plan to 'get' Mr. Scherer which you would like to discover—
>
> Mr. Sherwin: Which I would like to disclose of record.
>
> The Court: And disclose of record, what would that have to do with the allegations of the indictment in this case?" (Tr. 1226)

The Court closed its eyes to all but the events charged in the indictment. It was not going to be concerned with past history—with the ten or more years that the defendant was the target of unscrupulous activity on the part of ATF agents. Even though the information sought could have established the link between events past and present, and could have exposed the devious means by which ATF agents operated—*the Court sustained the Government's motion to quash the subpoenas* (R. 62) *and thereby deprived defendant of access to needed reports.*

The defendant was entitled to show the reprehensible conduct to which he was subjected. He was entitled to show that time after time agents or informers were sent by agents of ATF to make buys from or sales to him. He was entitled to show that there were concentrated efforts on behalf of ATF, its agents and employees to harass, ensnare, entrap, and to bring about the defendant's arrest and prosecution. The defendant was not obligated to surrender his Fifth Amendment privilege against self-incrimination to make such a showing. He was entitled to make that showing through use of the ATF agents' own case reports, which had been requested innumerable times throughout the trial (Tr. 1464-66) and which were the object of the subpoena duces tecum.

By denying the defendant access to the subpoenaed agency reports and other material information, by refusing to order the production of government witnesses, and by failing to conduct a separate pre-trial hearing at which the defendant could have testified without waiving his constitutional right to remain silent at trial, the Court effectively foreclosed the defendant from making (assuming, *arguendo* that it was not made) the prima facie showing of discriminatory enforcement which it had always insisted upon.

The suppression by ATF concurred in by the prosecution of such evidence favorable to the petitioner upon request to the Court who suggested the use of subpoenas and who then quashed such subpoenas upon motion of the Government was violative of due process and is in conflict with this Court's decision in *Brady* v. *Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

CONCLUSION

This Court should settle the as yet unresolved questions of what records a licensed gun dealer is required to maintain under the provisions of the 1968 Gun Control Act and the regulations promulgated thereunder. This Court should also exercise its discretionary power of review and grant this Petition of a Writ of Certiorari to insure that prosecutions are undertaken in good faith with due regard for the concept of fundamental fairness, and to insure that defendants are not subjected to unwarranted intrusions on their civil liberties.

For all of the reasons set forth above, this Petition for a Writ of Certiorari to review the judgment of the Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

JULIUS L. SHERWIN
7 South Dearborn Street
Suite 1610
Chicago, Illinois
Attorney for Petitioner

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 74-2051

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ANTHONY SCHERER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74 CR 99
JAMES B. PARSONS, Judge.

Argued June 12, 1975—Decided September 4, 1975

Before CLARK, *Associate Justice (Retired),** SWYGERT and CUMMINGS, *Circuit Judges.*

SWYGERT, *Circuit Judge.* Appellant Anthony Scherer was convicted of violating the firearms registration and

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* The Honorable Tom C. Clark, Associate Justice (Retired) of the Supreme Court of the United States, sitting by designation.

recording requirements imposed on all federally licensed firearms dealers by 18 U.S.C. §§922(m), 923(g)[1] and regulations promulgated pursuant thereto. His conviction was based upon six counts of failing to maintain a Firearms Acquisition and Disposition Record in compliance with 26 C.F.R. §178.125,[2] and three counts of failing to complete

[1] 18 U.S.C. § 922(m) reads as follows:

(m) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector knowingly to make any false entry in, or fail to make appropriate entry in, or fail to properly maintain any record which he is required to keep pursuant to section 923 of this chapter or regulations promulgated thereunder.

18 U.S.C. § 923(g) reads in relevant part:

(g) Each licensed importer, licensed manufacturer, licensed dealer and licensed collector shall maintain such records of importation, production, shipment, receipt, sale, or other disposition, of firearms and ammunition at such place, for such period, and in such form as the Secretary may by regulations prescribe.

[2] 26 C.F.R. §178.125 reads in relevant part as follows:

(e) Each licensed dealer and each licensed collector shall on and after the effective date of this part enter into a permanent record each receipt and disposition of firearms or firearms curios or relics. . . . The sale or other disposition of a firearm or of a firearms curio or relic shall be recorded by the licensed dealer or the licensed collector not later than seven days following the date of such transaction. When such disposition is made to a nonlicensee, the firearms transaction record, Form 4473, obtained by the licensed dealer or licensed collector shall be retained, until the transaction is recorded, separate from his Form 4473 file and be readily available for inspection. . . . The record shall show the date of the sale or other disposition of each firearm or firearm curio or relic, the name of the person to whom the firearm curio or relic is transferred if such person is a licensee, or the firearms transaction record, Form 4473, serial number if the licensed dealer or the licensed collector transferring the firearm or curio or relic serially numbers his Forms 4473 and files them numerically.

Treasury Form 4473 as required by 26 C.F.R. §178.124.[3] Scherer has appealed from this judgment, urging reversal on numerous grounds. Our study of the issues presented convinces us that the ruling of the district court should be affirmed.

[3] 26 C.F.R. § 178.124 reads in relevant part as follows:

(a) A licensed importer, licensed manufacturer, or licensed dealer shall not sell or otherwise dispose, temporarily or permanently, of any firearm to any person, other than another licensee, and a licensed collector shall not sell or otherwise dispose of any curio or relic to any person, other than another licensee, unless he records the transaction on a firearms transaction record, Form 4473. . . .

(b) A licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall retain in alphabetical (by name of purchaser), chronological (by date of disposition), or numerical (by transaction serial number) order, and as a part of his permanent records, each Form 4473 he obtains in the cause of transferring custody of his firearms.

(c) Prior to making an over-the-counter transfer of a firearm to a non-licensee who is a resident of the State in which the licensee maintains his business or collection premises, the licensed importer, licensed manufacturer, licensed dealer, or licensed collector so transferring the firearm shall obtian a Form 4473 from the transferee showing the name, address, date and place of birth, height, weight, and race of the transferee, and certification by the transferee that he is not prohibited by the Act or Title VII of the Omnibus Crime Control and Safe Streets Act of 1968 (82 Stat. 236; 18 U.S.C. Appendix) from receiving a firearm in interstate or foreign commerce. The licensee shall identify the firearm to be transferred by listing in the Form 4473 the name of the manufacturer, the name of the importer (if any), the type, model, caliber or gauge, and the serial number of the firearm. lector so transferring the firearm shall obtain a Form 4473 from licensee (1) shall cause the transferee to identify himself in any manner customarily used in commercial transactions (*e.g.*, a driver's license), and shall note on the form the method used, and (2) if satisfied that the transferee is lawfully entitled to receive the firearm, shall sign and date the form.

The appellant is a federally licensed firearms dealer operating under the firm name of Precision Shooter Supply, Box 197, Route 1, Hampshire, Illinois. He maintains an office connected to a barn on his property from which he is licensed to conduct his firearm business. Between February and August 1972, Government informant George Rivard made four "controlled buys" of firearms from Anthony Scherer. None of these transactions occurred at Scherer's formal business office, nor were the customary 4473 forms completed in order to record the identity of the weapons sold.

Approximately one month after the final sale to Rivard, special agents of the Bureau of Alcohol, Tobacco and Firearms (ATF) obtained a search warrant for Scherer's property. The warrant was executed on October 4, 1972. Over seventy firearms were seized by the Government, along with Scherer's Firearms Acquisition and Disposition Record books. These items served as the basis for Scherer's arrest, indictment, and later conviction. In addition, counts one and two of the indictment charged Scherer with failing to record the sale of three firearms to dealer Joseph Schroeder in November 1971 and April 1972. Defendant was convicted of these charges as well.

I

The heart of Scherer's initial argument centers around his interpretation of the 1968 Gun Control Act. Specifically, Scherer contends that he was not required to maintain records regarding the acquisition or sale of his personal firearms, and argues that the Government is estopped from asserting any duty to the contrary. Reliance is primarily placed upon Industry Circular No. 72-30, released by the Treasury Department in 1972, which specifies guidelines for the identification of personal firearms located on the business premises of licensed dealers:

> A presumption exists that all firearms on a business premise are for sale and accordingly must be entered in the record required to be maintained under the law and regulations. However, it is recognized that some dealers may have personal firearms on their business premises for the purpose of display or decoration and not for sale. Firearms dealers who have such personal firearms on licensed premises should not intermingle such firearms with firearms held for sale. Such firearms should be segregated from firearms held for sale and appropriately identified (for example, by attaching a tag) as being "not for sale." Personal firearms on licensed premises which are segregated from firearms held for sale and which are appropriately identified as not being for sale need not be entered in the dealer's records.

According to Scherer's construction of the above guidelines, personal firearms located apart from the business premises need not be tagged or entered in a dealer's records. Since Scherer claims that the weapons seized were a part of his private collection and were stored in his home rather than his business office, he argues that he was exempt from recording their sale or disposition.

The necessary implication of these guidelines indicates that the act of selling a firearm, not its location or the arbitrary distinction between "personal" and "business" transactions, brings a weapon and the parties involved within the purview of federal control. In this regard, the terms of 18 U.S.C. §923(g) and the executing provisions of 26 C.F.R. §§178.124, 178.125 are clear. The statutes and regulations are comprehensive in their coverage, and refer to "any firearm" and "each disposition." They were designed to keep a constant record of the transfer and location of firearms in order to reduce the indiscriminate flow of such weapons and the crime that inevitably follows

in their wake.[4] A licensed dealer must therefore, comply with the recording provisions of 26 C.F.R. §§178.124 and 178.125 each time he disposes of a firearm. In the instant case it is immaterial whether the weapons sold were originally acquired for Scherer's personal use or for business purposes. They became a part of his business inventory the moment they were placed on the market for resale.

II

Scherer also alleges that he is exempt from the recording provisions of the Gun Control Act of 1968 because the sales listed in the indictment occurred at locations other than his licensed business premises.[5] Since he was not licensed to carry on a gun trade at any of the locations mentioned, he argues that he was not a federally licensed firearms dealer as to those places and thus not subject to the requirements of 26 C.F.R. §§178.124 and 178.125.

Initially we cannot agree that all of the gun sales did not occur on Scherer's business premises. The house where the bulk of these transactions took place was a mere eighty feet from the defendant's office and located on the same property. Scherer's status as a licensed firearms dealer and the responsibilities that attend to that title do not end with a mere step outside the door. Moreover, the language of 26 C.F.R. §§178.124 and 178.125 is devoid of any reference to location. It requires that *each* disposition of a firearm be recorded and kept on file

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[4] 1968 U.S. Code Cong. and Admin. News, pp. 4410, *et seq.*

[5] Three sales occurred inside Scherer's house, while the transfer of a fourth weapon took place at a gun show in Palatine, Illinois. Payment for this latter transaction occurred one week later at Scherer's home.

at the dealer's business office, and makes no exception for transactions conducted elsewhere. Although Scherer has not obtained a license for each place at which he does business as required by 26 C.F.R. §178.41(b), this does not absolve him of the responsibility to record these transactions. A licensed firearms dealer may not avoid this duty simply by changing his location. Scherer, therefore, was required to record the sales noted in the indictment in his Firearms Acquisition Record book within seven days after the disposition of the firearms and to complete Form 4473.

III

The defendant next contends that such disclosures would violate his Fifth Amendment privilege against self-incrimination. Specifically, Scherer's contention rests on two grounds: first, the requirement that he keep records of business transactions which he was not licensed to conduct would disclose violations of 18 U.S.C. §922(a)(1) and the regulations promulgated thereunder, and second, the requirement that he complete Form 4473 to record the disposition of a firearm to a nonlicensee would disclose his failure to obtain George Rivard's Firearm Owner's Identification Card number as required by Chapter 38, §83-3(a)(b) of the Illinois Revised Statutes.

An examination of Scherer's claims shows them to be without merit. The Supreme Court's decision in *Marchetti* v. *United States*, 390 U.S. 39, 53 (1968), makes it clear that "[t]he central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." No scuh "real" or substantial hazards are created here. The objectionable feature of the statutes found in *Marchetti* and the related

cases of *Grosso* v. *United States,* 390 U.S. 62 (1968), and *Haynes* v. *United States,* 390 U.S. 85 (1968), was that the act of registration itself constituted an *ipso facto* confession of criminality.

By contrast, the mere act of recording the sales of firearms or engaging in their transfer does not automatically subject a licensed firearms dealer to criminal penalties. He is not, therefore, subject to the incriminating straight-jacket of alternatives created in the cases above. Nor are 26 C.F.R. §§ 178.124 and 178.125 principally directed at persons who have failed to comply with other firearms registration provisions and thus "inherently suspect of criminal activity" as was the case in *Haynes,* 390 U.S. at 96. Rather, we find the holding of *Shapiro* v. *United States,* 335 U.S. 1 (1948), controlling in the instant situation. The statutes cited regulate an essentially non-criminal activity—the disposition of firearms—and fall within the "required records" standards established by *Shapiro* and further enunciated in *Grosso* v. *United States,* 390 U.S. at 67-68. As noted earlier, the recording procedures are a part of the congressional policy to regulate the sale of firearms, and are required of all federally licensed firearms dealers. Form 4473 and the entries noted in Scherer's Firearms Acquisition Record book have assumed the status of "public documents" by the fact that 18 U.S.C. §923(g) requires them to be continuously available for inspection by Government officials during business hours. We therefore hold that Scherer's failure to comply with 18 U.S.C. §923(g) and the regulations promulgated thereunder was not protected by the Fifth Amendment.

IV

Scherer also contends that the trial court erred in admitting his Firearms Acquisition and Disposition Record book, seized during the search of his premises. Scherer alleges that the search warrant was overly broad and vague in its description, and was issued upon an affidavit insufficient to establish probable cause. Both of these contentions must be rejected.

Initially, defendant's reliance upon the particularity standards enunciated in *Stanford* v. *Texas,* 379 U.S. 476 (1965), is misplaced. *Stanford* involved the seizure of political books, writings, and membership lists, and thus included elements of First Amendment privileges. The Court was careful to note "the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis of their seizure is the ideas which they contain." 379 U.S. at 485. By way of explanation, the Court distinguished "books" from "books and records" stating that a book "which is no more than a ledger of an unlawful enterprise this might stand on quite a different footing. . . ." *Id.* We hold that Scherer's Firearms Acquisition Record book falls into this latter category.

Furthermore, we believe that the particularity requirement is a rule of reason. Although the propriety of a search warrant must always be measured against the Fourth Amendment's rigid prohibition of general warrants, we do not find the warrant issued in this case to be overly broad in the constitutional sense. The facts are distinguishable from *VonderAhe* v. *Howland,* 508 F. 2d 364 (9th Cir. 1975), relied on by the defendant, where a warrant directing the seizure of "fiscal records

relating to the income and expenses of Dr. Donn Vonder-Ahe from his dental practice and other sources" was used to confiscate several cartons of personal and private material unrelated to the emergency cards sought by the authorities. We have no such abuse of the warrant here. The items seized were limited to a cache of weapons and Scherer's Firearms Acquisition Record Book—the document containing the "business records relating to the purchase and sale of firearms." The defendant's argument that the agents could have inspected the volumes on the business premises as permitted by law, ignores the realities of the situation. Scherer had failed to record numerous weapons in his books. An affirmation of this belief depended upon a cross-check of the weapons with the volume entries. Since the firearms were not located in the defendant's office, seizure of both the guns and records was the only feasible method of investigation.

Secondly, probable cause for issuing the search warrant also existed. Under the command of *United States* v. *Ventresca*, 380 U.S. 102 (1965), a magistrate may not properly issue a search warrant unless he can find probable cause for its issuance from facts or circumstances presented in the affidavit. Additionally, underlying circumstances from which the affidavit could reasonably conclude that the informant was credible must also be presented. *Aguilar* v. *Texas*, 378 U.S. 108 (1963). All of these factors are present here. Rivard's charges that Scherer was selling firearms from his house was bolstered by the four purchases made at this location, three of which were made under Government surveillance. Prior to each purchase Rivard had been able to provide Government agents with the name, price, and model number of each weapon eventually sold. Finally, Rivard's assertion that numerous weapons were lying about Scherer's house, and that

Scherer was keeping two Thompson machine guns without serial numbers in a box in his barn was corroborated by two special agents who visited the defendant's farm prior to the search.

V

In regard to this latter point, Scherer also argues that the affidavit contained misrepresentations of fact because the machine guns were inoperable, missing essential parts, and thus not genuine. Scherer contends that the trial court erred in failing to grant his motion to suppress. We do not agree. We hold that the trial judge was in the best position to determine this issue on the basis of the evidence before him. Absent a showing by the defendant that the misrepresentation, if any, was intentional or reckless, the motion to suppress was properly denied.

VI

Turning to counts one and two of the indictment, Scherer next argues that without proof of the year of manufacture, the Government failed to prove that the firearms sold to Joseph Schroeder were not antiques and thus exempted from the provisions of 18 U.S.C. § 923(g).[6] This contention must also be rejected. Ample testimony was produced at trial for the court to conclude that the weapons in question were not produced before 1898. Argument of Scherer's additional counsel, presented during post-trial motions, admitted that the model numbers appearing on a firearm, although not proof of the date

[6] 18 U.S.C. §921(a)(3) exempts antiques from the category of firearms regulated by the Gun Control Act of 1968. 18 U.S.C. § 921(a)(16) defines an antique firearm as "any firearm manufactured in or before 1898."

of that particular weapon's casting, do indicate that the weapon could not have been manufactured prior to that date. This corroborated testimony given earlier by various Government witnesses and experts heard during trial. Since none of the firearms in question bear model numbers of 1898 or earlier, we believe that the Government carried its burden of proof on this issue.

VII

Scherer's appeal also charges the Government with discriminatory enforcement of the Gun Control Act of 1968, and alleges error in the trial court's failure to grant a full evidentiary hearing in this matter. *United States* v. *Falk*, 479 F. 2d 616 (7th Cir. 1973), requires that the defendant first establish a prima facie case of discriminatory law enforcement sufficient to raise a reasonable doubt as to the prosecutor's purpose before he is entitled to a full evidentiary hearing. Scherer has not overcome this initial presumption of good faith as required by *Falk*. While it is evident that Scherer was under surveillance by Government agents for a number of years prior to his arrest, he has failed to offer evidence that he was singled out for such treatment, or that the Government's reasons for doing so belied an impermissible prosecutorial purpose. Additionally, we find no error in the district court's dismissal of Scherer's subpoenas to Government agents whose testimony was sought in regard to those matters. The alleged discriminatory events occurred prior to 1972, and Agent Brennan's surveillance of the defendant terminated in 1971. Absent a showing that these events were linked to the present indictment, the district court properly concluded that they were too remote in time and not relevant to the instant case.

VIII

Scherer's final point alleges that the sixteen-month delay between his arrest and indictment created substantial prejudice and violated his Fifth and Sixth Amendment rights to a speedy trial. To bolster his charge of prejudicial delay, Scherer claims that two witnesses scheduled to testify about George Rivard's poor reputation for truth had died. Additionally, three others who allegedly would have corroborated Scherer's claim of discriminatory prosecution were unavailable at the time of trial.

Barker v. *Wingo*, 407 U.S. 514, 530 (1972), relied upon by both parties, established a four-pronged balancing test for Sixth Amendment claims: the length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. Although we must take note of the fact that the Government fails to account for five of the sixteen months involved here, we cannot conclude that the prejudice created was severe enough to tip this balance in favor of the defendant.

Unlike *United States* v. *Macino*, 486 F.2d 750 (7th Cir. 1973), the Government offers justification for the delay in this case. For eleven months a comprehensive trace of the manufacture, prior sales, and final acquisition of the seventy-nine weapons seized from Scherer's home was conducted in order to investigate the possible existence of a national market in unregistered firearms. We believe the Government's interest in a full examination of this possibility outweighs any prejudice which may have resulted. Given the complexity of this task, we find the length of delay to be within the bounds of reason.

In addition, we perceive a difference between the types of witnesses involved and the degree of prejudice their absence is likely to create. *Macino* involved not only a

two and one-half year delay—one year longer than that experienced by Scherer—but also the death of the only eyewitness to the crime. By contrast, the witnesses in the instant case were character witnesses. Character witness testimony, while useful in establishing a defense, is not of the same magnitude as that which provides an absolute defense. *United States* v. *Brown,* 354 F. Supp. 1000, 1002 (E.D.Pa. 1973). Also, the absence of the three witnesses intended to bolster Scherer's claim of discriminatory prosecution created little prejudice since many of the events alleged were too remote in time and irrelevant to the present indictment. We therefore find no constitutional violations presented by these facts.

For all the reasons stated above, defendant's conviction is affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

OPINION BY JUDGE SWYGERT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

September 4, 1975
Before
Hon. Tom C. Clark, Associate Justice (Ret.)*
Hon. Luther M. Swygert, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge

United States of America,

Plaintiff-Appellee,

No. 74-2051

vs.

Anthony Scherer,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74 CR 99
James B. Parsons, Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

* Honorable Tom C. Clark, Associate Justice (Retired) of the Supreme Court of the United States, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

October 31, 1975

Before
Hon. Tom C. Clark, Associate Justice
Hon. Luther M. Swygert, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge

United States of America,

Plaintiff-Appellee,

No. 74-2051

vs.

Anthony Scherer,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
(74 Cr 99)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be, and the same is hereby, DENIED.

APPENDIX D

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED.

18 U.S.C. §922(m):

> "It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector knowingly to make any false entry in, to fail to make appropriate entry in, or to fail to properly maintain, any record which he is required to keep pursuant to section 923 of this chapter or regulations promulgated thereunder."

26 C.F.R. §178.41(b) provides in pertinent part:

> "A separate license must be obtained for each business and each place at which the applicant is to do business. Such license shall, subject to the provisions of the Act and other applicable provisions of law, entitle the licensee to . . . engage in the business specified by the license at the location described on the license, and for the period stated on the license. . . ."

26 C.F.R. §178.42 provides in pertinent part:

> "Each applicant shall pay a fee for obtaining a license, a separate fee being required for each business or collecting activity at each place of such business or activity, . . ."

26 C.F.R. §178.50 provides in pertinent part:

> "The license covers the class of business or the activity specified in the license at the address described therein. Accordingly, a separate license must be obtained for each location at which a firearms or ammunition business or activity requiring a license under this part is conducted; however, no license is required to cover a separate warehouse used by the licensee solely for storage of firearms or ammunition if the records required by this part are maintained at the licensed premises served by such warehouse. . . ."

26 C.F.R. §178.124 provides in pertinent part:

(a) A licensed importer, licensed manufacturer, or licensed dealer shall not sell or otherwise dispose, temporarily or permanently, of any firearm to any person, other than another licensee, and a licensed collector shall not sell or otherwise dispose of any curio or relic to any person, other than another licensee, unless he records the transaction on a firearms transaction record, Form 4473. . . .

(b) A licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall retain in alphabetical (by name of purchaser), chronological (by date of disposition), or numerical (by transaction serial number) order, and as a part of his permanent records, each Form 4473 he obtains in the cause of transferring custody of his firearms.

(c) Prior to making an over-the-counter transfer of a firearm to a non-licensee who is a resident of the State in which the licensee maintains his business or collection premises, the licensed importer, licensed manufacturer, licensed dealer, or licensed collector so transferring the firearm shall obtain a Form 4473 from the transferee showing the name, address, date and place of birth, height, weight, and race of the transferee, and certification by the transferee that he is not prohibited by the Act or Title VII of the Omnibus Crime Control and Safe Streets Act of 1968 (82 Stat. 236; 18 U.S.C. Appendix) from receiving a firearm in interstate or foreign commerce. The licensee shall identify the firearm to be transferred by listing in the Form 4473 the name of the manufacturer, the name of the importer (if any), the type, model, caliber or gauge, and the serial number of the firearm. Before transferring the firearm described in the Form 4473, the licensee (1) shall cause the transferee to identify himself in any manner customarily used in commercial transactions (*e.g.*, a driver's license), and shall

note on the form the method used, and (2) if satisfied that the transferee is lawfully entitled to receive the firearm, shall sign and date the form.

26 C.F.R. §178.125 provides in pertinent part:

"(e) Each licensed dealer and each licensed collector shall on and after the effective date of this part enter into a permanent record each receipt and disposition of firearms or firearms curios or relics. In addition, before commencing or continuing firearms business or firearms curio and relic collection, each licensed dealer and licensed collector shall inventory the firearms or firearms curios and relics possessed for such business or in such collection and shall record same in the record required by this paragraph. . . ."

AMENDMENT IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

TREASURY DEPARTMENT CIRCULAR #72-30 provides in pertinent part:

"*Guidelines for Identifying Personal Firearms on the Business Premises of Licensed Dealers.* A presumption exists that all firearms on a business premises are for sale and accordingly must be entered in the records required to be maintained under the law and regulations. However, it is recognized that some dealers may have personal firearms on their business premises for the purpose of display or decoration and not for sale. Firearms dealers who have such personal firearms on licensed premises should not intermingle

such firearms with firearms held for sale. Such firearms should be segregated from firearms held for sale and appropriately identified (for example, by attaching a tag) as being "not for sale". Personal firearms on licensed premises which are segregated from firearms held for sale and which are appropriately identified as not being for sale need not be entered in the dealers records."